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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 206.

J. B. SMYTH ET AL., APPELLANTS,

vs.

ASPHALT BELT RAILWAY COMPANY ET AL.

BRIEF FOR THE APPELLEES.

R. J. BOYLE,
G. W. WHARTON,
MASON WILLIAMS,
J. D. WHEELER,
Counsel for Appellees.

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BRIEF FOR THE APPELLEES.

The statement of the case as made by the appellants in their brief is substantially correct.

In the beginning of the brief the appellants state that the "error of the Court in dismissing the bill came about by reason of the fact that he overlooked the well-established principle that a motion to dismiss admits, at least for the purposes of the motion, all the facts well pleaded in the bill of complaint, and that the Court failed to give effect, in his consideration of the motion to dismiss, to the facts pleaded in the bill and considered only the facts proved at the hearing of said motion for interlocutory injunction."

The record shows that in neither hearing did the Court pass on the motion to dismiss in the beginning of the pro-

ceeding, but held it in abeyance until he had heard the pleadings, the evidence, and argument of counsel. In other words, until after the appellants had developed their full case.

We submit that under these circumstances the rule relied upon by appellants has no application, and that when parties agree, tacitly or otherwise, to such a proceeding the Court, in passing on the whole case to ascertain whether or not it has jurisdiction, has a right to "consider the facts" proved at the hearing.

Jurisdiction is the first question for the Court to consider, and if there had been no motion to dismiss and the Court, after hearing the evidence of appellants, had concluded that it was without jurisdiction, it would have been its duty, of its own motion, to dismiss the bill.

It would be a vain and foolish thing to reverse a case on the rule relied on by appellants when the record showed that appellants had fully developed all the testimony they had, and this testimony showed a lack of jurisdiction in the district court.

The record as to what happened at the trial discloses the following:

The first hearing was on July 30, 1913, and the interlocutory order entered at such hearing, omitting the formal parts, is as follows:

> "Came on to be heard the above styled and entitled cause upon the original and supplemental complaints of the complainants, J. B. Smyth, W. A. Smith, and Uvalde Rock Asphalt Company, and the motion to dismiss as well as the original and supplemental answers of the defendants, Asphalt Belt Railway Company, San Antonio, Uvalde & Gulf Railroad Company, and

A. R. Ponder, receiver of the properties and assets of said San Antonio, Uvalde & Gulf Railroad Company; and the Court having heard the pleadings of the parties, the evidence introduced, and the argument of counsel, is of opinion that this Court is without jurisdiction in this cause.

"It is therefore ordered, adjudged and decreed:

"*First.* That said application for injunction be and the same is hereby denied, and the temporary restraining order heretofore issued in this cause is hereby dissolved.

"*Second.* That, subject to the right of complainant to further amend their bill of complaint within ten days from this date, if they be so advised, leave thereto being hereby granted, said bill of complaint as now amended shall be and the same is hereby dismissed.

"*Third.* That no part of this order shall be held to prejudice the right of complainants to make a further application for a temporary injunction on such further amendment, if any, as they may file within the time aforesaid, or to raise and assert in the condemnation proceedings, mentioned in said bill, any of the questions raised herein or to defend such proceeding on any ground mentioned in said bill as amended.

"To all of which complainants excepted and gave notice of appeal" (Record, pp. 45-46).

The Court will please note that the case came on to be heard upon the original and supplemental complaints, the motion to dismiss, the original and supplemental answers of the defendants, "*and the Court, having heard the pleadings of the parties, the evidence introduced, and the argument of counsel,*" held that it had no jurisdiction.

This shows clearly that, without objection on the first hearing, the Court passed the motion to dismiss, to be considered with the whole case.

At the second hearing "came on to be heard the application for injunction on complainants' original bill and the first and second amendments thereto, and the Court, having heard the pleadings, evidence, and the argument of counsel, is of opinion that the Court is without jurisdiction, and that the defendants' motion to dismiss the bill and the amendments should be and the same is hereby granted" (Record, p. 69).

This clearly shows that, without objection on the second hearing, the Court passed the motion to dismiss, to be considered with the whole case.

Again, in the memorandum opinion filed by the District Judge, it is stated that on July 30th the suit was dismissed for lack of jurisdiction; that plaintiffs were allowed to amend *"and a further hearing and resubmission of the whole matter was had on August the 24th"* (Record, p. 73).

These references are sufficient to show that appellants can not be serious in their contention that the Court was in error in considering evidence, but that he should have confined himself solely to the allegations of the bill.

The brief of appellants contains six main subdivisions, the first five of which are confined exclusively to the discussion of the pleadings in order to show that on the face of the pleadings the Court had jurisdiction, and that, therefore, regardless of the evidence, the case should be reversed on account of equity rule 29, above referred to.

We think we have conclusively shown that equity rule 29 does not apply in this case, and hence these five subdivisions

become immaterial and are "excess baggage" in the unusually long brief filed by appellants.

These subdivisions in the brief do not seem to bear much, if any, relation to the specifications of error filed in the Court below; however, we will discuss each one separately in as short a space as possible.

No. 1 is devoted exclusively to attempting to show that the complainants in the original bill are "parties in interest" within the purview of the act.

It is true appellees raised the question of appellants being "parties in interest," but the Court overruled this contention and heard the case on the merits.

The District Judge, in the memorandum opinion, says:

> "Since the plaintiffs' right to injunction rests upon provisions of an act of Congress regulating interstate commerce, the Court would be without jurisdiction unless the facts show (1) that the Asphalt Belt Railroad Company is owned and controlled by the San Antonio, Uvalde & Gulf Railroad Company, an interstate carrier, thus constituting it an extension and branch of the latter road, or (2) that the A. B. Company is obligated by law and its purpose is to carry on business as an interstate carrier" (Record, pp. 73-74).

Thus it is clearly seen that the trial court held that the appellants were "parties in interest" and placed the want of jurisdiction on two other distinct grounds, neither of which is discussed in subdivision 1 of appellants' brief. We deem it unnecessary further to discuss subdivision 1.

Subdivision 2 attempts to show that the Court had jurisdiction on account of the allegations in the bill and the supplements thereto.

As previously stated, the Court below held that he was without jurisdiction because of the two questions of fact which were resolved against appellants. It is, therefore, unnecessary further to discuss subdivision 2, as the Court's ruling on these facts is nowhere questioned in said subdivision.

Subdivision 3 states that the bill showed a good cause for injunction under paragraph 20 of Section 1 of the Interstate Commerce Act.

The want of jurisdiction, according to the Court, resting upon the two questions of fact, both of which were resolved against the appellants, this subdivision of the brief has no application to any supposed error committed by the lower Court.

Subdivisions 4 and 5 assert the proposition that the proceedings for condemnation are a part of the proposed construction, and that, therefore, such proceedings should be enjoined, regardless of Section 265 of the Judicial Code. As this interesting discussion is purely academic and cannot possibly have any bearing on whether or not the Court committed error in passing on the two questions of fact, which he considered controlled the jurisdiction, we will pass the matter by.

The sixth and last subdivision asserts that "in view of the pleadings and the evidence the Court below erred in refusing to issue the preliminary injunction as prayed for." This is the only place in the brief where the sufficiency of the evidence is questioned, and we will point out to the Court some of the evidence sustaining the finding of the lower court.

We understand it to be the universal rule that the findings of fact of the lower court will not be disturbed by the

appellate court unless the evidence clearly shows that there is no sufficient basis for such findings.

The controlling questions of fact, according to the District Judge, are, first, Is the Asphalt Belt Railroad Company owned and controlled by the S. A., U. & G.; and, second, is the Asphalt Belt Railway Company obligated by law and is it its purpose to carry on business as an interstate carrier? (Record, pp. 73-74.)

As to the first:

The San Antonio, Uvalde & Gulf Railroad Company is in the hands of a receiver appointed by the trial court, and it has been in the hands of a receiver for many years, and A. R. Ponder is the receiver (Record, p. 83).

Mr. Ponder testified that he had an interest for quite awhile in the outstanding securities of the S. A., U. & G. Railroad Company, and that Mr. Kell and Mr. Eldridge have a contract for certain interests, and if the contract is carried out Mr. Kell will have 48 per cent and Mr. Eldridge 48 per cent; that he did not acquire his interest at the same time they acquired theirs; they came in later and bought an option; that he was one of the original holders of securities, and that, in effect, he will continue his place in the list of stockholders and bondholders practically as he originally had; that his stock is paid for, and that the stock of Kell and Eldridge is not; that they made a payment on the purchase price when the deal was consummated and gave notes on which there has been no payment except interest.

That there was a contract made between the Texas Rock Asphalt Company and Mr. Kell and Mr. Eldridge relating to the construction of the Asphalt Belt Railroad and the

financing of the cost of construction; that the matter of constructing this railroad to reach the mines of the Texas Rock Asphalt Company was first brought up to him a couple of years ago; that he did not consider the matter much at first because he could do nothing as receiver or as an individual, but after the other gentlemen became interested he laid the matter before them (Record, pp. 85-86).

That the parties to this contract to build the Asphalt Belt Railway are the Texas Rock Asphalt Company, Mr. Kell and Mr. Eldridge; that he was not a party to it in his individual capacity, though he expects to be interested in the railroad if it is built; that at the time the contract was made it was not made for the benefit of Kell, Eldridge, and himself, as the arrangement had not been completed that he would come in on this new line; that no kind of contract had been made by him as receiver of the S. A., U. & G. and the Asphalt Belt Railway Company relating to the divisions of revenues on traffic to move over the two lines" (Record, p. 87).

That he had not thought of what basis of rates would be applied from the northwestern terminus of the proposed line; that he got an order from the Texas Railroad Commission to make the rates from Pulliam (on the S. A., U. & G) the same as they are from Cline to Texas points, and that this order of the Texas Railroad Commission did not apply to the Asphalt Belt Railway; that he applied to the Texas Railroad Commission to make rates to intrastate points in Texas from Pulliam the same as the Southern Pacific rates from Cline (Record, p. 88).

That the directors of the Asphalt Belt Railway Company have elected officers, and that H. P. McMillan is president (Record, p. 88).

That each of the incorporators of the Asphalt Belt Railroad Company had subscribed for some of the stock, but Mr. Kell, Mr. Eldridge, and himself have subscribed for a majority of the stock; that each of the incorporators has the stock and it is in their names, and, so far as he knows, they own the stock and paid the money individually; that the money was not furnished by Mr. Kell or Mr. Eldridge or himself (Record, p. 89).

That so far as he knows there have been no plans made looking to the operation of the Asphalt Belt Railway Company, and that it is not a fact that it is his intention or the intention of his associates that power and equipment would be furnished to that line under lease or some other kind of contract by him as receiver of the S. A., U. & G.; that he discussed the cost of building of the railroad with Mr. Kell and Mr. Eldridge, and that the cost of power and equipment was also discussed in connection with the road, and that they talked about how much power and how many cars would be needed; that they have been getting prices on cars and locomotives too; that it is not a fact that he thought the S. A., U. & G., if it could get the long haul on this traffic, could well afford to furnish what cars were needed for loading on this line; that the S. A., U. & G. has no cars of its own for that business; that they have no surplus at all of cars that would be required for this movement (Record, p. 90).

That he does not remember of there being any discussion looking to the construction of this line from Pulliam out to the asphalt company's mines by any other method than that of incorporating a separate railroad for that purpose (Record, p. 95).

It was agreed between counsel that the Texas Rock Asphalt Company has been in operation for about two years and never has sold any asphalt outside of the State of Texas (Record, p. 109).

"The COURT: How long has the Texas Rock Asphalt Company been in active operation?

"Mr. WILLIAMS: Two years.

"The COURT: To what extent, in approximate figures, what amount of tonnage have they been moving to market?

"Mr. BOYLE: Handle from 30,000 to 35,000 tons a year.

"The COURT: Is that asphalt company—is that tributary to the Southern Pacific Company at Cline?

"Mr. BOYLE: All of that stuff is teamed to Cline, and shipped from Cline.

"The COURT: I notice there is a spur there.

"Mr. BOYLE: The spur at Cline runs to the Uvalde Rock Asphalt Company's mine?

"The COURT: Yes, sir.

"Mr. BOYLE: The Southern Pacific runs to the Uvalde Rock Asphalt Company. The Texas Rock Asphalt Company has no rails of any kind; all of its business has been teamed to Cline and from there shipped over the Southern Pacific.

"The COURT: How far do they team it?

"Mr. BOYLE: Team it about eight miles.

"The COURT: The particular purpose, then, of this line, whether it be public, private, or unlimited, is for the purpose of reaching the asphalt mines of the Texas Rock Asphalt Company?

"Mr. BOYLE: Yes, sir.

"The COURT: All right. And do I understand it is the purpose of the Texas Rock Asphalt Company

and of the Asphalt Belt Railway Company to limit their business operations to intrastate traffic?

"Mr. BOYLE: Yes, sir.

"Mr. WILLIAMS: Strictly."

(Record, pp. 109-110.)

It will thus be seen from the testimony that there is ample evidence to support the findings of fact made by the lower court to the effect that the Asphalt Belt Railway Company is not owned or controlled by the S. A., U. & G.

The authority of the Court in so holding needs no further support than the case decided by this Court and cited by the trial court—Georgia, S. & F. Railway Company *vs.* Georgia Public Service Commission, 289 Fed., 878.

Peterson *vs.* Chicago, R. I. & P., 205 U. S., 364.

As to the second grounds—that is, is the Asphalt Belt Railway Company obligated by law, and is it its purpose to carry on business as an interstate carrier?

Its pleadings allege that it has no intention of doing an interstate business. It is building to the Texas Rock Asphalt Company's mines, which have been in operation for two years, and the testimony above quoted shows that said asphalt mines have never sold a pound of asphalt outside of the State of Texas.

We think there can be no question but that there are railroads which are not subject to the Interstate Commerce Act.

The language of the act conclusively shows that, in the opinion of Congress, there are carriers to which said act does *not* apply. The act begins, Section 18: "After ninety days after this paragraph takes effect no carrier by railroad, *subject to this act*" shall construct a railroad, etc., without getting

a certificate from the Interstate Commerce Commission. And, again (latter part of Section 18), it is said: "And no carrier by railroad, *subject to this act*, shall abandon all or any portion of its line," etc. (Italics are ours.)

If Congress had not recognized that there *are* carriers by railroad *not* subject to the Interstate Commerce Act, of which the Transportation Act is merely an amendment, then this language would not have been used. It would have said "No carrier by railroad" shall do thus and so, because the words "subject to this act" would have been superfluous.

Likewise the Supreme Court of the United States recognizes that there are carriers that are not subject to the Interstate Commerce Act.

In Texas *vs.* Eastern Texas Railroad Company, 258 U. S., at page 213, Mr. Justice Van Devanter, in speaking of these sections of the Transportation Act, says:

> "Like the act of which they are amendatory, these paragraphs are specially restricted to the carriers engaged in transporting persons or property in interstate and foreign commerce."

The Reid case (Southern Ry. Co. *vs.* Reid, 222 U. S., 430) likewise holds that there are carriers not subject to the Interstate Commerce Act, and the railroad company was sustained in its refusal to accept an interstate shipment of freight, even though the statutes of North Carolina have similar provisions to the statutes of Texas, commanding any common carrier to accept any freight destined for any point.

In the matter of the application of Duluth and North Minnesota Railway Company for a certificate of public convenience and necessity, 71 I. C. C. Reports, 795, the Commission said:

> "It is further contended, both by the attorney general and the protestants, that if the paragraphs in question apply to a road located wholly within a state, they are unconstitutional and void, because beyond the power of Congress to enact. Since the briefs were filed, however, the Supreme Court of the United States has interpreted paragraphs (18) to (20), inclusive, of Section 1, and has held that, as interpreted, they are valid. Texas *vs.* Eastern Texas R. R. Co. *et al.*, decided March 13, 1922. This decision establishes that Congress could and did authorize us to sanction the discontinuance of interstate and foreign commerce on a line of railroad located wholly within one State and operated by a corporation of that State which does not operate any line of railroad extending through more than one State. It follows that the effect of our certificate in this case was to permit the applicant herein to abandon interstate and foreign commerce, leaving the question of continued operation for intrastate service to be disposed of in other proceedings."

Having, then, determined, both by the act under consideration and by the decisions of the Supreme Court, that there are carriers by railroad not subject to the Interstate Commerce Act and, therefore, not subject to these provisions thereof, let us investigate the authoritative definition of such carriers.

It seems to us that we find the definition of such a carrier clearly stated in the Eastern Texas Railroad case above cited. Mr. Justice Van Devanter says:

> "The road lies entirely within a single State, is owned and operated by a corporation of that State, and is not a part of another line."

Is that not a complete definition of the Asphalt Belt Railway Company?

And the Court then says that the Commission has no authority over the discontinuance of purely intrastate business of a road such as the one described above.

But counsel urge, with vehemence, that the Asphalt Belt Railway Company, when constructed, will be required to accept any shipments destined to or coming from any point, and they rely on Revised Statutes of Texas, Article 6588, requiring railroads to carry United States mails, and Articles 6608 and 6610, requiring railroads to receive and forward all freight tendered to them by their connections or patrons.

These articles of the statutes were passed between 1883 and 1887, and the Interstate Commerce Act was passed in 1887 and has been amended many times since that date.

These articles of the statutes, relied on by counsel, have to do with the shipment of freight and passengers in interstate and foreign commerce, as well as intrastate commerce. In so far as they affect only intrastate shipments, they are perfectly valid and binding on the carriers, but in so far as they affect interstate and foreign commerce they are not valid if they contravene any act of Congress having to do with this particular phase of interstate and foreign commerce.

That proposition is so clear that it is useless to cite authorities.

Take, for instance, the Reid case above cited (222 U. S., 430). The statutes of North Carolina, which the Court will find set out in the margin of the opinion, is very similar to the articles of the statute relied on by counsel in this case.

Mr. Justice McKenna, in the Reid case, held that these statutes of North Carolina were inoperative and reversed a

judgment of the Supreme Court of North Carolina penalizing the railroad for not accepting an interstate shipment.

See also

Erie R. R. *vs.* N. Y., 233 U. S., 671.

Western Union Telegraph Co. *vs.* Voeglin, 251 U. S., 315.

Caizek *vs.* Western Union, 272 Fed., 227.

Can anything be clearer than that these articles of the statute are inoperative in so far as they apply to interstate commerce?

The Interstate Commerce Act provides that no carrier shall ship goods in interstate commerce unless and until through or joint rates have been established between the two points and such rates have been filed with the Interstate Commerce Commission.

Under the Reid case, could a Texas railroad be penalized for refusing an interstate shipment when it had not complied with this provision of the Interstate Commerce Act?

Likewise could the Asphalt Belt Railway Company, when constructed, be penalized for refusing to accept an interstate shipment when it had complied neither with the above provision of the Interstate Commerce Act nor with the provisions of the Transportation Act requiring a certificate of convenience and necessity?

These provisions of the Interstate Commerce Act render nugatory the articles of the Texas statutes relied on by counsel in so far as said articles of the statutes relate to interstate and foreign commerce.

There are roads in existence recognized by the Transportation Act and by both the Interstate Commerce Commission

and the Supreme Court as not coming under the provisions of said Interstate Commerce Act. Cannot another one be created under the sovereign power of the State of Texas?

The proposition upon which counsel for plaintiff in this case rely to sustain their contention that the Asphalt Belt Railway Company, defendant, is an interstate carrier and, as such, subject to the provisions of the amendment to the Interstate Commerce Act, commonly known as the Transportation Act of 1920, is this: That the charter granted to the Asphalt Belt Railway Company by the State of Texas and the laws of the State of Texas authorize and require the Asphalt Belt Railway Company to engage in Interstate Commerce.

In the case of Gibbons *vs.* Ogden, 9 Wheaton, page 1, opinion by Mr. Chief Justice Marshall, the provision of the Constitution of the United States granting to the Congress of the United States the power to regulate interstate commerce is first construed, and it is there held that this power is exclusive, and that the several States have no power or authority over interstate commerce. Subsequently this decision was modified by our Supreme Court to the extent that the several States have a right to exercise authority on some subjects of interstate commerce (such subjects being within the police power of the several States) in the absence of any legislation by Congress, but that whenever Congress exerts its paramount authority over such subject the power of the State ceases to exist, and all State regulations in conflict with the Act of Congress are struck down.

Prior to 1887 the Congress of the United States had not exercised its authority over interstate commerce by railroad, but since that time, by repeated amendments to the Interstate

Commerce Act, has extended its authority over interstate commerce so as to define all duties and obligations of carriers by railroad engaged in interstate commerce, and by the amendment of 1920, known as the Transportation Act, has provided that no carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this act, over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

While it may be true that prior to Federal legislation on the subject the carriers by railroad within the State of Texas, or any other State, could have been required by the laws of the State of Texas to engage in interstate commerce, action by Congress destroyed the possibility of such assumption, since such action renders the State impotent to deal with the subject over which it had no interest, but only permissive power.

The contention, therefore, of counsel for plaintiff that at the time of the incorporation of the Asphalt Belt Railway Company (1923) the charter and laws of the State of Texas

both authorized and required such railroad to engage in interstate commerce is untenable, since the statutes of the State of Texas, to which plaintiff refers, have no application to interstate commerce. For instance, counsel for plaintiff cites Article 6588 of the Revised Statutes of Texas, providing for the transportation of United States mail by railroads, and providing that in the event the railroad company is unable to agree with the Postmaster General on the charge for this service, the Government shall appoint three commissioners to fix the price and terms on which they shall handle such mail. United States Statutes 7478 and 7523 contain elaborate and detailed regulations covering the transportation of mail by railroad, which provisions conflict with the statute of the State of Texas referred to, and it would be absurd to contend that a railroad company could assert the right to handle mail in accordance with the provisions of the Texas statute and contrary to the provisions of the Federal law referred to.

Articles 6608, 6609, and 6610 of the Revised Statutes of Texas undertake to define the terms and conditions under which railroads in Texas shall interchange business, and Articles 405, 416, 418, and 419 of the Interstate Commerce Act fix and define the terms and conditions under which interstate carriers shall interchange business.

Article 6711 of the Revised Statutes of Texas undertakes to provide for the interchange of traffic between railroads and water carriers, while the Congress of the United States, since the passage of that State statute has made full provision for the interchange of traffic between interstate rail and water carriers.

In fact, it will be found upon examination that every statute of the State of Texas which counsel for plaintiff has

cited as requiring a railroad chartered under the laws of the State of Texas to engage in interstate business has been superseded by subsequent enactments by the Congress of the United States defining the rights, duties, and obligations of interstate carriers with reference to all of these matters.

As is said by the Supreme Court of the United States in Southern Railway Company *vs.* Reid, 222 United States, 425, referring to the scope of the Interstate Commerce Act:

> "There is scarcely a detail of regulation which is omitted to secure the purpose to which the interstate commerce is aimed. It is true that words directly inhibitive of the exercise of state authority are not employed, but the subject is taken possession of."

The fact that the Interstate Commerce Act prohibits any carrier to engage in interstate commerce until tariffs have been filed and published, as provided in that act, being the expression of the paramount authority over interstate commerce, is in itself sufficient to demonstrate that any State laws undertaking to require carriers to engage in interstate commerce are by the force of this provision stricken down.

The contention raised by counsel here was in effect raised in the Reid case and sustained by the State courts, where a carrier was subject to penalties for refusal to accept an interstate shipment under a State statute which levied a penalty for refusal of a railroad company to accept any shipment offered it for transportation. We quote from the opinion by the Supreme Court in passing on that case the following:

> "The question is, where is the control, in the State or Congress, and has Congress acted? That the control is in Congress we have seen; that it has acted is

demonstrated by the provisions of the Interstate Commerce Act to which we have referred. As we have seen, schedules of rates, whether the road be single or forms with another a 'through route,' must be established, filed and published designating the places. They cannot be changed without permission of the Interstate Commerce Commission, and no carrier is permitted to engage or participate in the transportation of passengers or property unless the rates for the same have been so filed and published. Criminal punishments are imposed for violations of these requirements, and civil redress of injuries received by shippers is given through the Interstate Commerce Commission. See Robinson *vs.* Baltimore & O. R. R. Co., 222 U. S., 506; *post*, 288; 32 Sup. Ct. Rep., 114. By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their impartial application. The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the statute requires him to do, and punishes disobedience by successive daily penalties.

"We cannot assume that it was without consideration of its necessity that Congress enacted Sec. 2 of the Hepburn Act. It was no doubt the adaptation of experience to the exigencies of a practical problem—Congress coming to believe that the most effective way to prevent preferences in charges by carriers was to forbid them to 'engage or participate in the transportation of passengers or property' until they had fixed and proclaimed the rate to be charged therefor—a rate that would be not only for one shipper or shipment, but for all shippers and shipments; not for one

> time only, but for all times. The power of Congress to so provide cannot be doubted. If the regulations be not exclusive, this situation is presented: If the carrier obey the State law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the State law. Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground. In so deciding we take no essential power from the States. The balances of the Constitution are only preserved, and there is given to the States the power which is the States' and to Congress the power which belongs to Congress."

As is suggested by the Supreme Court in that case, if a State statute can require a carrier to engage in interstate commerce contrary to the provisions of the Federal law, the situation would be presented that if a carrier refused to engage in interstate commerce, as required by the State law, and contrary to the provisions of the Federal law, the carrier would be subject to State penalties, and, on the other hand, if the carrier engaged in interstate commerce in conformity with the State law, and contrary to the provisions of the Federal law, the carrier would be subject to Federal penalties.

This question was again presented to the Supreme Court of the United States in the case of Chicago, Rock Island & Pacific Railway Company *vs.* Hardwick Farmers Elevator, 226 U. S., 436 (57 L. Ed., 284), where a carrier was subject to a penalty for failure to furnish freight cars demanded to be used in interstate traffic, the penalty being fixed by a State statute, and the State statute was held by the Supreme Court of the United States to have no application to interstate commerce. Mr. Chief Justice White, delivering the opinion of the court, says:

"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate-commerce regulation, even if such subject was embraced within that class of powers concerning which the State had a right to exert its authority in the absence of legislation by Congress, it must follow, in consequence of the action of Congress to which we have referred, that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where, from the particular nature of certain subjects, the state may exert authority until Congress acts, under the assumption that Congress, by inaction, has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field, and renders the State impotent to deal with a subject over which it had no inherent, but only permissive, power. Southern Railway Company *vs.* Reid, 222 U. S., 434; 56 L. Ed., 257; 32 Sup. Ct. Rep., 140."

The question has been before the Texas courts on many occasions as to whether or not State statutes regulate interstate transportation by railroads, and in every case where Congress in the exercise of its paramount authority over interstate commerce had legislated on the particular subject, our Texas courts, following the decision of the Supreme Court of the United States, have held the State statutes inoperative as to interstate commerce. We cite said cases as follows:

G., C. & S. F. Ry. Co. *vs.* Gray, 87 Texas, 312.
S. A. & A. P. Ry. Co. *vs.* Bracht, 172 S. W., 1116.

A., T. & S. F. Ry. Co. *vs.* Smyth, 189 S. W., 70.
Miller *vs.* Goodwin, 91 Texas, 41.
State *vs.* G., H. & S. A., 184 S. W., 678.
Woessner *vs.* Cotton, 47 S. W., 227.
Western Union Telegraph Co. *vs.* Schoonmaker, 181 S. W., 263.
M., K. & T. Ry. Co. *vs.* Fookes, 40 S. W., 858.
Western Union Telegraph Co. *vs.* Smith, 188 S. W., 702.

More recently the Congress of the United States, by the Act of 1910, undertook to control the interstate business of telegraph companies, and in the case of Postal Telegraph Company *vs.* Warren-Godwin Lumber Company, 251 U. S., page 27 (64 L. Ed., 251), the Court passed on the State statute invalidating a contract limiting the liability of a telegraph company for error in sending an unrepeated message, which statutes had been applied to the case of an interstate message, and it was held that Congress having exerted its authority to bring under Federal control the interstate business of the telegraph company, there was, therefore, an occupation of the field by Congress which excluded State action.

To the same effect in Western Union Company *vs.* Voeglin, 251 U. S., 315 (64 L. Ed., 281), opinion by Mr. Chief Justice White, where the court said:

> "We are of opinion that the provisions of the statute bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no

> room thereafter for the exercise by the several States of power to regulate, by penalizing the negligent failure to deliver promptly an interstate telegram, and that the court below erred, therefore, in imposing the penalty fixed by the State statute."

Counsel for plaintiff present the novel theory that, notwithstanding the State law imposes upon all railroads incorporated under the laws of the State of Texas the duty to engage in interstate commerce, that we seek to assert the right to avoid the obligation imposed upon us by the laws of the State of Texas by contending that we can do so by refraining from publishing and filing tariffs as required by the Interstate Commerce Act. Such is not our position. In the first place, we deny most vigorously, and the authorities cited sustain our position, that there is no law of the State of Texas which authorizes or requires the Asphalt Belt Railroad to engage in interstate commerce; that, on the contrary, the State of Texas could only authorize, and has only authorized, the Asphalt Belt Railroad to engage in intrastate commerce; that Congress, being the paramount authority over interstate commerce, and having legislated on the subject of interstate commerce, or, in other words, having occupied the field of legislation on that subject to the exclusion of the several States, the Asphalt Belt Railroad could not acquire the right or authority to engage in interstate commerce except by complying with the provisions of the act of Congress on the subject of interstate commerce, which requirements are so numerous that it would be a useless waste of the Court's time to set them up here.

Counsel devotes a great part of his brief to a discussion of what constitutes interstate commerce, but that is beside the

question. The fact remains that the Federal Government has fixed the terms and conditions under which a carrier by railroad may engage in interstate commerce, and no State legislation to the contrary has any force or effect. If the Asphalt Belt Railway Company should undertake to engage in interstate commerce by reason of State statutes which have no application to interstate commerce, and contrary to the provisions of the Interstate Commerce Act, which is the expression of the paramount authority on the subject, the Asphalt Belt Railroad would be subject to the severe penalties imposed by the Act to Regulate Commerce.

If the contention of counsel for plaintiff in this case is tenable, that corporations incorporated under the laws of the State of Texas are required by laws of the State of Texas to engage in interstate commerce, then we are confronted with the absurd situation that the Legislature of the State of Texas has destroyed the powers vested in the State of Texas by the Federal Constitution and the Constitution of the State of Texas to regulate intrastate commerce, since if no corporation can engage in transportation within the State of Texas without engaging in interstate commerce, no corporation can engage in the transportation business in Texas until it has met the requirements of the Interstate Commerce Act.

Clearly it was not the intention of the Congress of the United States to invade the powers of the several States over intrastate commerce. The Interstate Commerce Act itself specifically provides that it shall apply to common carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, in interstate commerce, and the act specifically provides that it shall not apply to the transportation of pas-

sengers or property, or to the receiving, delivering, storing or handling of property, wholly within one State. Again, in subdivision 17 of Section 402, the act says:

> "*Provided, however*, that nothing in this act shall impair or affect the right of a State in the exercise of its police power to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this act."

The certificate of convenience and necessity provisions are found for the first time in the Interstate Commerce Act in the amendment of 1920, paragraphs 18, 19, and 20 of Section 402.

Section 18 provides that ninety days after this paragraph takes effect, "no carrier by railroad subject to this act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate, etc."

Clearly the Asphalt Belt Railroad is not the extension of a line of railroad subject to the Interstate Commerce Act, neither is it a railroad subject to the Interstate Commerce Act undertaking the construction of a new line of railroad. It cannot become a railroad carrier subject to the act until it complies with all of the provisions of the Interstate Commerce Act necessary to enable it to lawfully engage in interstate commerce. We respectfully submit that the purpose and intention of the carrier is an essential and vital

matter. If the carrier has just been incorporated and has not constructed its line of railroad or engaged in any business, and has not filed any tariffs with the Interstate Commerce Commission, or met any of the other requirements for engaging in interstate commerce, it is clearly not subject to the Interstate Commerce Act, and if this avowed purpose and intention cannot be inquired into by a court, prior to its actually engaging in business, to ascertain whether it is or is not its purpose and intention to engage in interstate commerce, then clearly in the case of a railroad, such as the one at bar, chartered for the purpose of being constructed wholly within one State and not having engaged in business, the Court must hold that it is not a carrier subject to the Act to Regulate Interstate Commerce.

Again, on the question of the purpose and intention of the carrier being a potent inquiry, we submit that the provision of the law for an application for a certificate of convenience and necessity by a carrier subject to the Interstate Commerce Act which intends to construct a new line of railroad, clearly contemplates that the carrier must in this application declare its purpose and intention to engage in interstate commerce; otherwise the Interstate Commerce Commission would have no jurisdiction of its application, since its authority is limited to carriers engaged in interstate commerce, and we submit further that if a carrier should make an application to the Interstate Commerce Commission for a certificate of convenience and necessity and declare its purpose and intention not to engage in interstate commerce, but to confine itself to intrastate business, the Interstate Commerce Commission would have to dismiss the application for want of jurisdiction, since it has no power over in-

trastate carriers and its authority is confined to carriers engaged in interstate commerce.

The question of whether or not the certificate-of-convenience provisions of the Interstate Commerce Act have application to intrastate carriers was before the Supreme Court of the United States in the case of The State of Texas *vs.* Eastern Texas Railway Company, originally tried in this same district court. While it is true that case involved an abandonment question, the provisions of the law with reference to certificates of convenience and necessity apply alike to abandonment and new construction. We quote from the opinion of the Court as follows:

> "The only matters in controversy are whether, by paragraphs 18, 19 and 20, Congress has assumed to clothe the Commission with authority to sanction the entire abandonment of a road such as this, and, if so, whether the power of Congress extends so far.
>
> "The road lies entirely within a single State, is owned and operated by a corporation of that State, and is not a part of another line. Its continued operation solely in intrastate commerce cannot be of more than local concern. Interstate and foreign commerce will not be burdened or affected by any shortage in the earnings, nor will any carrier in such commerce have to bear or make good the shortage. It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line, and thereby affect its utility or service as an artery of interstate and foreign commerce.
>
> "As a whole, these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be inci-

dental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce. Minnesota Rate case (Simpson *vs.* Shepard), 230 U. S., 352, 418; 57 L. Ed., 1511, 1549; 48 L. R. A. (N. S.), 1151; 33 Sup. Ct. Rep., 729; Ann Cas. 1916 A, 18; Railroad Commission *vs.* Chicago, B. & Q. R. R. Co., 257 U. S. 563; *ante,* 371; 42 Sup. Ct. Rep., 232. And had there been a purpose here to depart from the accustomed path and to deal with intrastate commerce as such, independently of
is but reasonable to believe that that purpose would have been very plainly declared. This was not done.

"These considerations persuade us that the paragraphs in question should be interpreted and read as not clothing the Commission with any authority over the discontinuance of the purely intrastate business of a road whose situation and ownership, as here, are such that interstate and foreign commerce will not be burdened or affected by a continuance of that business."

The Eastern Texas Railroad was engaged in both interstate and intrastate business, and if the statutes of the State of Texas quoted by counsel for plaintiff as requiring the Texas railroad to engage in interstate business have any force and effect to that end, then clearly the Interstate Commerce Commission could not have authorized the Eastern Texas Railway to abandon interstate business. Furthermore, if it be true, as contended by counsel for plaintiff, that a railroad corporation cannot engage in intrastate business without at

the same time engaging in interstate business, then the certificate of the Interstate Commerce Commission authorizing the Eastern Texas Railway Company to abandon interstate business, and the decision of the Supreme Court of the United States that its certificate must be construed as properly authorizing the Eastern Texas Railroad to abandon interstate business, mean nothing.

Counsel for appellants devote a great deal of their brief to a discussion of the proposition that the construction and operation of the Asphalt Belt Railroad without a certificate of convenience and necessity would mean that such railroad would, by reason of the inadequacy of its earnings, constitute a burden on the interstate commerce, but this question is well met and disposed of by the Supreme Court of the United States in the Eastern Texas case. A railroad located wholly within the State and engaged solely in intrastate business cannot, by any shortage in its earnings, become a burden on interstate commerce. Its operation in intrastate commerce would be purely a matter of local concern, and its earnings could bear no relation to, or in any manner affect, interstate commerce.

The suggestion has been made that while it is the purpose and intention of the Asphalt Belt Railroad to engage in intrastate commerce only, that a shipment originating at some interstate point might at some time, through reconsignment and local billing, be handled by the Asphalt Belt Railroad, and for that reason the Asphalt Belt Railroad should be held to be a carrier engaged in interstate commerce and subject to the Interstate Commerce Act. Such a holding would be in effect amending the Interstate Commerce Act to provide that no railroad shall be constructed in the United States,

whether subject to the Interstate Commerce Act or not, without obtaining a certificate of necessity, thereby destroying the rights of the several States to promote, incorporate, and regulate intrastate commerce.

We respectfully submit that it is clear, under the Constitution of the United States and the decisions of the Supreme Court of the United States, that the right to regulate interstate commerce is vested in the Congress of the United States, and that when it legislates on the subject of interstate commerce its legislation is the expression of the paramount power before which the State legislation fails; that it is equally true that the right is reserved to the several States in the Union to regulate intrastate commerce, and that the Congress of the United States cannot invade or destroy this right; that the Congress of the United States has legislated fully and completely in the matter of regulation of interstate commerce by railroads, and that neither the State of Texas, nor any other State, has the power or authority, by constitution or statute, to authorize or require a railroad corporation, incorporated by it, to engage in interstate commerce; that the Federal Government has legislated fully on the subject of interstate commerce by railroad, and that any railroad incorporated under the laws of the State of Texas, or any other State, can obtain authority to engage in interstate commerce only by complying with the requirements of the Federal legislation on that subject.

We respectfully submit, further, that there is no merit in the contention that the statutes of the State of Texas, cited by counsel for plaintiff, authorize, empower, or require railroads incorporated under the laws of the State of Texas to engage in interstate commerce, but that, on the contrary,

the only authority such railroads obtain by virtue of the charter granted by the State of Texas is to engage in intrastate commerce, and that all railroads incorporated under the laws of the State of Texas are, in fact, prohibited from engaging in interstate commerce unless and until they comply with the requirements of the paramount law on the subject of interstate commerce, under the act of Congress of the United States known as the Interstate Commerce Act.

We have never taken, and do not now, take the absurd position which counsel for plaintiff accredits to us, that the only way in which a railroad built after the passage of the Act of 1920 can become subject to the Act of 1920 is by violating the Interstate Commerce law and moving interstate commerce without filing tariffs. On the contrary, our contention is that if it was the purpose and intention of the Asphalt Belt Railroad to engage in interstate commerce, it would be its duty, under the Interstate Commerce Act, to make application for and obtain a certificate of necessity, and, after granting of that certificate of necessity and the construction of the railroad, to in all other things comply with the Interstate Commerce Act. We do contend, however, that the State of Texas has the authority to incorporate a railroad to be constructed wholly within the State of Texas, and that such a railroad is authorized by its charter to engage in intrastate commerce only, and that if it is the only declared purpose and intention of that railroad company to engage in intrastate commerce, as its charter authorizes it to do, no Court is authorized to assume that it has in fact a concealed purpose to violate the terms and conditions of the Interstate Commerce Act, or to engage in interstate commerce contrary to provisions of the Interstate Commerce Act, and

to declare it to be an interstate carrier subject to the Act to Regulate Interstate Commerce, either on the assumption that it has a concealed purpose, contrary to its avowed purpose, to engage in interstate commerce in violation of the law or upon the presumption that some agent or officer of the railroad company may some time, without the purpose or intention of violating the Interstate Commerce Act, haul over the line of the railroad an interstate shipment moving on reconsignment and local billing.

We have always understood that a Court should indulge the presumption that it is the purpose of a litigant before the Court to comply with the law rather than violate it, and we know of no case where a Court has indulged the presumption contrary to the avowed intention of the party before the Court, that it was his concealed purpose to violate the law.

We further submit that the proposition that this Court should indulge the presumption that it is the intention of the defendant railway company to violate the law, or that it may at some time innocently handle an interstate shipment without knowing its interstate character, and, therefore, hold it to be a carrier subject to the Act to Regulate Commerce, has a still more serious effect, and that is it strikes down the constitutional right and power of the State of Texas to promote and encourage the development of intrastate commerce and the incorporation of transportation companies for that purpose, and in effect relegates to a Federal agency, the Interstate Commerce Commission, full power and authority over a matter of purely local concern, which the Supreme Court of the United States has said the Congress of the United States by its enactments did not intend; and if such construction is put upon the enactment of the

Congress of the United States, the constitutionality of such enactments are doubtful, to say the least.

We respectfully pray that the judgment of the trial court be affirmed.

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SAN ANTONIO, TEXAS, *October* 18, 1923.

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